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MICHIGAN HOUSE OF REPRESENTATIVES

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Written testimony regarding HR 176 (2007)
October 25, 2007

Chairman Clemente and esteemed members of the New Economy and Quality of Life Committee:

Poorly implemented, over-reaching legislation attracts opponents who rise up against it for many different reasons. While several parts of Title II of the REAL ID Act¹ are well intended, the way the legislation has gone about trying to accomplish its goals has made it unworkable. While it seems quite obvious that the States should have been equal players at the table, the federal government has instead taken a unilateral, top down approach that requires the ultimate in faith when trust with Washington is at an all time low. Originally passed in 2005 with its vague wording and overdue final rules, it is hard for REAL ID to overcome the early suspicion it garnered when it was ultimately signed into law as only a rider on a bill with no public hearings. This is not the way to gain the trust of State governments or the American people.

As currently crafted, the REAL ID Act is a national identification scheme that would put the federal government permanently in charge of Michigan's driver's licenses. It does so not through the partnership of a negotiated rulemaking process with the States, as originally called for. It does so not by Congress directly mandating finite new standards. Instead, it sets a precedent that would unilaterally allow unelected bureaucrats in Washington to perpetually create new rules, both now and in the future, that would determine the standards under which Michigan's licenses would have to continually conform to. Mandates will be made on what information goes on the card, what advanced biometrics it must be encoded with, whether wireless RFID technology must be used, and with whom the data must be shared.

First, let me dispel three myths.

1) Some assert that this is not a national ID card for the reason that it would not be owned or paid for by the federal government. I look at it another way: if Michigan ultimately doesn't have a real say in what information goes on the card, who it can be shared with, its biometrics, or its technology, it's no longer Michigan's license no matter what it says across the top. This is really about the federal government wanting to have a new federal ID card but not wanting to administer it through the national ID schemes they already have, social security cards and passports. Unlike those cards, a driver's license is routinely carried almost everyday and presented for things as mundane as renting a DVD or joining Sam's Club. For those in favor of an expanded national ID, it would be the worst choice of all documents to be turned into a sensitive document that citizens would need to safeguard to keep their constitutional rights from misappropriation or loss.

2) Some assert that Title II of the REAL ID Act is optional. Yet under the proposed rules for REAL ID, the taxpayers of Michigan will not be able to use their licenses for domestic air-travel, to open most bank accounts, or to enter into federal buildings. In short, they will not be able to function in society. The fact that citizens could use passports in lieu of REAL ID is also a false choice, as there is little doubt that obtaining a passport in the future would be a "federal purpose", and as such, citizens would not be able to use a non REAL ID compliant license to get one. Whether citizens would even be able to enter a federal post office without a REAL ID in order to renew a passport is a real question, as is the current commitment of the federal government to fund an affordable, timely, and fully functioning passport system.

3) Some assert that the forthcoming "final rules" of the REAL ID Act will be truly that: final and non-controversial. Such a strategy may indeed help grease the skids for initial acceptance of this program. However, if history is any judge, such federal identification schemes, such as our social security numbers, are created without protective laws to prevent stolen data and mission creep. In fact, REAL ID goes a step beyond this and actually has mission creep built directly into the law, with the preliminary rules formally asking for suggestions on additional "ancillary" uses for REAL ID for purchasing cigarettes, alcohol, and firearms.² And because it has already been acknowledged that States can not fully comply with REAL ID because the rules are such a moving target, we are being told that deadlines can be extended for those States that promise to comply with new regulations or databases in the future. Many of these regulations and databases are not yet even created or fully operational. To gain trust, the final rules must

ultimately speak as much to what the cards won't or can't do before we should be willing to fully jump in.

Similar concern over what would definitively constitute a future "official federal purpose" is shared by many groups, including the National Rifle Association, who have pointed out that the proposed rules solicit comment on "[w]hether other federal activities should be included". In his written testimony, Executive Director Chris Cox states that "The NRA believes there should be no expansion of this limited class of 'official purposes'." As such, they suggest adding specific language of limitation to the final rules.³

Such precautions are necessary when analyzing the top down nature of the REAL ID Act, which seeks to unilaterally impose federal mandates onto a State's sovereign license. As such, I am in favor of the federal government returning to a formal negotiated rulemaking process with the States so that other legal limitations can be put onto any future requirements.

Specifically, I would ask for at least three additional legal limitations:

- 1) That the final rules contain language that expressly prohibits the sharing of license information with other countries, including Canada and Mexico. The original version of REAL ID called for States to become members in the compact known as the *Drivers License Agreement* (DLA)⁴, which as proposed allowed the Provinces/Territories of Canada and the States/Federal District of Mexico to participate. Although this provision has been dropped from the current version of the bill, it has been proposed that REAL ID's national database be administered by the *American Association of Motor Vehicle Administrators* (AAMVA), which helped to author the DLA. AAMVA also currently has North American members on both its board and its subsidiary, *International Registration Plan, Inc*⁵. The national database must ultimately only be a true pointer system, with well defined and legal limits, that operates in a manner that does not allow it to escape federal privacy laws, and

- 2) That the final rules contain language that expressly prohibits the use of radio frequency identification chips (RFID), or similar remote technology. The *Department of Homeland Security* is currently requiring long range RFID to be placed in so called "dual purpose" licenses under the *Western Hemisphere Travel Initiative*, and is seeking comment on their inclusion with REAL ID⁶. This vicinity read RFID is passive technology that can reliably broadcast to readers 30 feet away or more, and would turn our cards into small wireless computers that seem more in

line with a United Nations identity scheme⁷, not one used by the United States of America, and

3) That the final rules contain language that make them just that, final, so that any additional changes to regulations in the future must be first passed as finite new laws by members of the United States Congress, and not simply as a reauthorization of the regulatory blank check that is REAL ID. This will help to ensure a level of accountability from some of the same federal agencies that frequently have not followed through on their promises to adequately safeguard sensitive data from identity theft, have entered us into harmful international agreements, and have failed to close our borders by not building fences or fully enforcing our current visa laws.

In conclusion, I would like to point out that Title II of the REAL ID Act is most injurious because it halted the negotiated rulemaking efforts with the States on how to make our licenses more secure that was already underway⁸. This is a real need if done correctly, and we may have already arrived at the proper solutions if REAL ID had not destroyed that initial process. In the meantime, many States have refrained from going forward with legislative solutions that they could, and should, be initiating on their own, because they have been reluctant to act before the release of the final REAL ID rules. With those rules already a year overdue, REAL ID has paralyzed States and slowed needed reforms.

In the meantime, seventeen other States have passed bills or resolutions calling for Congress to rework or repeal Title II of the REAL ID Act. These include states like Colorado, who have moved forward with some of the toughest licensing standards in the country, as well as other states such as New Hampshire, Georgia, Oklahoma, and South Carolina.

Michigan can not afford to wait on Title II of the REAL ID Act to make necessary license reforms. We must also have the fortitude to reject any requirements that overreach, are harmful, or counterproductive. Michigan needs to take matters into its own hands, and move forward with real and workable driver's license reforms without locking itself into a federal program that has yet to earn our trust or respect.

¹ Title II of the REAL ID Act deals with imposing national standards onto state-issued driver's licenses and non-driver's identification cards. It does not deal with other aspects of the REAL ID Act, such as section 102, which gives the Department of Homeland Security the ability to waive environmental laws when building border fences through fragile habitat.

² (Federal Register / Vol. 72, No. 46 / Friday, March 9, 2007 / Proposed Rules, page 10846)

³ Excerpt from NRA testimony submitted by Chris Cox regarding the REAL ID NPRM (DHS Docket 2006-0030). "We propose amending the proposed section 37.33 to read as follows, by adding the underlined language:

(b) States must provide to all other States electronic access to information contained in the motor vehicles database of the State, in a manner approved by DHS pursuant to this regulations. However, no State shall provide such access to any information in its motor vehicle database related to a license or identification card holder's status with respect to the possession or carrying of firearms, except in response to a specific inquiry related to a bona fide criminal investigation. This section does not intend to supercede DOT requirements codified at 49 CFR parts 383 and 384."

⁴ Federal HR 418, as introduced 1/26/05, SEC. 203. LINKING OF DATABASES.

(a) IN GENERAL.—To be eligible to receive any grant or other type of financial assistance made available under this title, a State shall participate in the interstate compact regarding sharing of driver license data, known as the "Driver License Agreement", in order to provide electronic access by a State to information contained in the motor vehicle databases of all other States.

⁵ www.irponline.org/MembershipLeadership/board/members

⁶ According to the proposed rules for REAL ID (Federal Register / Vol. 72, No. 46 / Friday, March 9, 2007 / Proposed Rules, page 10842), the DHS seeks comments on how a State DMV could offer a WHTI compliant REAL ID card "while also including a Machine Readable Zone meeting International Civil Aviation Organization Standards", such as Radio Frequency Identification integrated circuit chip technology.

⁷ The International Civil Aviation Organization (ICAO) is a United Nations (UN) agency that sets international best practices for passport standards.

⁸ "REAL ID Revolt", The Wall Street Journal, page A18. May 8, 2007.